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SUPREME COURT, U.S.

NO.

In The

80-1816

SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1980

ROBERT F. PARRATT, Warden,

Petitioner,

vs.

JESSE J. FORD,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

J. William Gallup
Penthouse Law Offices
1100 Farm Credit Building
Omaha, NE 68102
Telephone (402) 422-0800
Attorney for Respondent

ARGUMENT

I.

The opinion of the Circuit Court is not inconsistent with the holding of this Court in Summer v. Mata.

At the outset it should be noted that Summer v. Mata, 66 L.Ed.2d 722 was decided on the same day as this case, January 21, 1981. It was, therefore, of no benefit to the Circuit Court of Appeals. Despite the fact that Mata's teachings had not yet reached the Circuit Court, its opinion was not in conflict with it in any manner.

The petitioner contends on page 13 of his brief that "The Circuit Court in the present case cited no subsection of 28 U.S.C. Sec. 2254(d) when it reached a different conclusion than the two state courts and one federal court below on whether promises or threats were made to Ford to obtain his plea to the charges." Petitioner did not understand Mr. Ford's legal attack. Ford withdrew this contention in the United States District Court and based his argument there and in the Circuit Court of Appeals on the grounds that his trial attorney was ineffective in not conducting an investigation into the rumored pregnancy of the victim before allowing Ford to plead guilty to rape. The District Court was aware of this; and Judge Schatz said, in reference to this point, " . . . . This issue (guilty plea induced by promises) was also raised in Ford's habeas petition, but in his brief he has chosen not to challenge the finding of the district court at the post-conviction hearing that no promises or threats were made to Ford to obtain a guilty plea." EXHIBIT D, MEMORANDUM OPINION, App.20, Petitioner's brief.

The petitioner is well aware of the fact that the battle waged in the federal district court concerned only the issue of whether counsel was ineffective in not conducting an investigation into an unsubstantiated rumor that the alleged rape victim was pregnant. Petitioner attempted to ignore this argu-

ment by contending that it had never been presented to the Nebraska Supreme Court, and hence Ford had not exhausted his state remedies as to that issue. EXHIBIT D, MEMORANDUM OPINION, App. 22, Petitioner's brief. Petitioner repeats this contention on page 10 of his brief where he says "This specific argument (ineffective counsel in not conducting an investigation into the rumored pregnancy of the victim) was never presented to the Nebraska Supreme Court although his case was before that court three times."

The opinion of the Nebraska Supreme Court on this case is a model of brevity. It appears on pages 15 and 16 of petitioner's appendix. The opinion deals only with the issue of whether the plea was induced by threats and promises. The Court concluded that "The finding of the District Court that the defendant's plea of guilty was understandingly and voluntarily made and not induced by threats and promises is supported by the record." (Emphasis added). This is important because the petitioner contends, in order to come within the holding of Mata, that the Circuit Court of Appeals concluded that the state finding was "not fairly supported by the record." The Circuit Court, however, as well as the United States District Court, recognized that Ford's argument was that his guilty plea was entered without effective assistance of counsel, thus it was not voluntarily and knowingly made. The state court never made any finding concerning the failure of counsel to investigate the pregnancy rumor. The only reference in the state court opinion on this matter is the following comment: "The defendant also testified that since a possibility existed that the victim was pregnant, his guilty plea was somehow involuntary. The argument does not even merit discussion." (Emphasis added. See page 16 of petitioner's appendix.) Since the pregnancy matter was never discussed by the Nebraska Supreme Court, there wasn't any "finding" by the state court on that issue which was entitled to a "presumption of correctness" by the Circuit Court of Appeals.

In sum, the Circuit Court of Appeals was not substituting its judgment for that of the state court. It did not conclude that a relevant state determination was not fairly supported by the record. As shown above, there was no determination by the state court on the issue of whether counsel's failure to investigate the pregnancy constituted ineffective assistance of counsel. The Circuit Court, therefore, was not reaching a conclusion contrary to a state finding. While it is true that the state court found that Ford was represented by competent counsel, it did not even consider the question in light of the claim that no investigation of the pregnancy rumor was made and that the rumor induced the plea. The Circuit Court opinion was anything but unreasoned. Its reasoning and reference to the state record is set out in detail. It refers to the record seven times in the course of its discussion. Even if the Circuit Court was reaching a contrary decision to the state court on a matter that the state court had considered, it complied with Mata by referring to the record and explaining how the record supported its determination. One brief example will suffice to prove this point. The entire fifth page of the Circuit Court's opinion (Petitioner's brief, App. 5)refers to the state court record and the Court's analysis of it. None of the facts referred to there were involved in the state court's determination. If they had been, the Circuit Court opinion clearly detailed why the state finding was "not fairly supported by the record."

II.

The judgment of the Circuit Court was not in conflict with the decision of this Court in Johnson v. Zerbst.

The petitioner cites Johnson v. Zerbst, 304 U.S. 458 (1937) as authority for its position that the Circuit Court failed to give a presumption of regularity to judgments of lower courts. This argument is the same one advanced in his first argument, to wit: that the opinion of the Circuit Court is inconsistent with this Court's holding in Mata. We repeat, to the point of

monotony, the state courts reached no conclusions as to whether the failure to investigate the rumored pregnancy constituted ineffective assistance of counsel. The state court said this did not even merit discussion. The Circuit Court was clearly thus not substituting its judgment for that of the state court, since the state court had never passed judgment on that point, refusing even to consider it.

III.

The finding of the Circuit Court that Ford did not have effective assistance of counsel when he pled guilty was consistent with decisions of this Court.

The cases cited by petitioner to support his claim that Ford should have been denied relief by the Circuit Court were all carefully discussed by the Circuit Court in its opinion and distinguished. The respondent can add nothing to the treatment given them by the Circuit Court.

CONCLUSION

The respondent respectfully requests that this Court deny certiorari in this case.

JESSE FORD, Respondent,

By J. William Gallup

J. William Gallup
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Respondent's Brief In Opposition to Petition for a Writ of Certiorari upon the Petitioner by mailing said copy U.S. Mail, postage prepaid, addressed to Marilyn B. Hutchinson, Assistant Attorney General, 2115 State Capitol, Lincoln, NE 68509, on this 23 day of July, 1981.

J. William Gallup

Subscribed in my presence and sworn to before me this 23 day of July, 1981.

Notary Public

GENERAL NOTARY - State of Nebraska
KAY MARIE MASON
My Comm. Exp. Oct. 8, 1981

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MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The Respondent, Jesse J. Ford, by and through his attorney, asks leave to proceed in forma pauperis pursuant to Rule 53.

The Affidavit of Respondent's counsel in support of this motion is attached hereto.

JESSE J. FORD, Respondent,

By: J. William Gallup

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Omaha, NE 68102
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Attorney for Respondent

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ROBERT D. ST. VRAIN
CLERK

U.S. COURT & CUSTOM HOUSE
1114 MARKET STREET
ST. LOUIS, MISSOURI 63101

TELEPHONE NUMBER
425-5600
AREA CODE 314

July 1, 1980

Mr. J. William Gallup
Attorney at Law
Penthouse - Farm Credit Building
Omaha, Nebraska 68102

Re: No. 80-1561. Jesse J. Ford, Appellant vs. Robert F. Parratt, Warden, Appellee. (District Court Number CV-78-L-209)

Dear Mr. Gallup:

Enclosed for your use is a copy of CJA Form 20 which provides for your appointment to represent this appellant under the provisions of the Criminal Justice Act as amended. You should keep an accurate record of your time in this case and of any expenses which you incur. Please refer to Section VI of the enclosed Plan regarding compensation for your representation of this appellant. After the case is closed, the two white copies of Form 20 are to be returned to this office for Court approval. You are to retain the yellow copy for your personal files.

Also enclosed is an appearance form, which is to be completed and returned to this office immediately. Kindly file five copies of your typewritten brief with this office and serve an additional copy of your brief on the Attorney General. You should also send a copy of your brief to the appellant personally. Typewritten briefs are to be on letter-size paper and fastened in the left margin. The cost of printing will not be allowed as an expense. However, the cost of xeroxing or similar copying services is reimbursable. You should govern yourself in accordance with the provisions of amended Local Rule 11.

If you have any questions concerning this appointment or Court policies and procedures, please call this office. This appointment is a personal appointment and cannot be delegated to someone else without prior Court approval.

Robert D. St. Vrain
Clerk of Court by: K Knuckles

kdk
Enclosures
cc: Mr. Jesse J. Ford, P.O. Box 81248, Lincoln, Nebraska 68501
Hon. Paul L. Douglas, Attorney General, State Capitol Building, Lincoln, Nebraska 68509
Mr. William L. Olson, Clerk, U.S. District Court, P.O. Box 129, Omaha, Nebraska 68101
Mr. W. Wayne Buckner, Appeals Expediter (314) 425-5888
FTS# 279-5888

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AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF NEBRASKA)
COUNTY OF DOUGLAS) ss.

I, J. William Gallup, being first duly sworn according to law, depose and say in support of Jesse J. Ford's Motion for Leave to Proceed in Forma Pauperis:

1. I am the court-appointed attorney for the Respondent.

2. That I was appointed by the United States District Court to represent Mr. Ford in the United States District Court, and I was later appointed by the Circuit Court of Appeals to represent Mr. Ford in that Court.

3. That Jesse J. Ford is without funds to pay the costs of printing a response to Petitioner's brief.

4. That Jesse Ford is indigent to my knowledge and has been adjudged indigent by both the United States District Court and the Circuit Court of Appeals.

5. That attached to this Affidavit and incorporated by reference is a letter to affiant from the Circuit Court of Appeals.

J. William Gallup
J. William Gallup

SUBSCRIBED and sworn to before me this 23 day of July, 1981.

GENERAL NOTARY - State of Nebraska
KAY MARIE MASON
My Comm. Exp. Oct. 8, 1981

Kay Marie Mason
Notary Public